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IN THE

Supreme Court of the United States

October Term, 1955

No. 193

EARL WEST, et al, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK E. FLYNN
328 Security Building
Phoenix, Arizona
Counsel for Petitioner

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Your Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 19, 1956.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, in the above entitled cause numbered 14,854, was entered on the 19th day of April, 1956, and to date has not been published in the Reports.

JURISDICTION

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was entered on the 19th day of April, 1956. A timely motion for rehearing was

filed on May 17, 1956, and on May 25, 1956, an order was entered by the Circuit Court of Appeals denying the Petition for Rehearing (App. A14).

The jurisdiction of the District Court was invoked under 28 U.S.C., Sec. 1345. The jurisdiction of the Circuit Court rests on 2 8U.S.C., Sec. 1291. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1) The interpretation and application of Article VIII of the Constitution of the White Mountain Apache Tribe, Fort Apache Indian Reservation.

2) Did the Petitioners have vested rights or rights of occupancy of long established allocation and do those rights include grazing privileges as well as dwelling places and improvements within the meaning of Article VIII of the Constitution?

3) Is Article III of Ordinance 22, of the White Mountain Apache Tribe, Fort Apache Indian Reservation, which attempts to interpret and to limit the application of Article VIII, unconstitutional and in violation of Article VIII of the Tribal Constitution?

STATUTES INVOLVED

The determination of the merits of this case involve Article VIII of the Tribal Constitution and Article III of Ordinance 22 of the White Mountain Apache Tribe, Fort Apache Indian Reservation, which are set out in full in the appendix and quotations from which will be found in the statement (App. A11, A12).

STATEMENT

The Petitioner, EARL WEST, is a white man and the husband of Petitioner ELSIE WEST, who is a member of the White Mountain Apache Tribe, Fort Apache Indian Reservation, and other Petitioners are children of ELSIE WEST and EARL WEST and all are either enrolled members of the White Mountain Apache Tribe or are eligibile to be so enrolled. (R 30)

ELSIE WEST is a granddaughter of Corydon Cooley, (R. 31, Pars. 6 & 7), a white man, who in 1872 married an Apache Indian and began raising cattle on what is now part of the Indian reservation (R. 30, Par. 5).

EARL WEST and ELSIE WEST have grazed cattle on the Fort Apache Indian Reservation since 1923 and the other Petitioners, their children, have owned and grazed cattle on the reservation for several years prior to 1953. (R. 31, Par. 8).

In 1926, the then Superintendent of the Reservation recognized the right of the West family to graze cattle on the reservation and particularly on that portion of the reservation where they were grazing cattle in April of 1953. (R. 31-32, Par. 9).

In 1936, the then Superintendent of the Reservation again recognized the rights of the Petitioners on the reservation. (R. 32, Par. 10).

That since 1924, the Petitioners have made valuable improvements on that portion of the reservation where they were grazing cattle, consisting of houses, fences, wells and so forth. (R. 32, Par. 11).

On August 15, 1938, the Tribe adopted a constitution and by-laws in accordance with Section 16 of the Indian Reorganization Act of July 18, 1934, (48 Stat. 984) and as amended by the Act of July 15, 1935, (49 Stat. 378) and said Constitution and By-laws were approved by the Secretary of the Interior on August 26, 1938. (R. 20, Par. 2).

On August 3, 1953, the Council of the Indian Tribe enacted an ordinance known as Ordinance No. 22 which was approved by the Superintendent of the Agency and was approved by the Assistant Secretary of the Interior on November 3, 1953. Said Ordinance became effective August 7, 1953. (R. 29, Par. 3).

That in April of 1954, the Superintendent of the Reservation, together with members of the Tribe, seized Petitioner's cattle and removed them from that part of the reservation where they were grazing. This seizure was made without any process or order from any court. (R. 33, Pars. 14-15).

That in May of 1954, this action was commenced in the District Court, for the District of Arizona, by the United States of America, in which action the plaintiff demanded possession of all lands on the reservation where Petitioners had been grazing cattle and for an order permanently enjoining and restraining Petitioners from causing or permitting their cattle from entering upon or grazing upon the reservation. (R. 4-20).

The trial court found for the Petitioners and against the Government (R.35), and as a matter of law found that the Petitioners had acquired rights of occupancy within the meaning and protection of Article VIII of

the Constitution and that Ordinance 22 was ineffectual to change or abrogate the rights of Petitioners (R. 34). The Circuit Court reversed the judgment of the trial Court (App. A13).

REASONS FOR GRANTING WRIT

The question presented by this petition, and which was raised in the Circuit Court by the Statement of Points to be relied on upon appeal (R. 158) is an important and novel legal question in that it involves the interpretation of the Constitution adopted by the Tribe and also involves the constitutionality of an ordinance adopted by the Tribal Council.

The determination of this question could affect every Indian Tribe which has been granted self-government.

The pertinent part of Article VII of the Tribal Constitution reads as follows:

> "Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances."

The pertinent part of Ordinance No. 22 reads as follows:

> "This ordinance shall apply to all lands within the Fort Apache Indian Reservation * * * provided, that the rights accruing to members of the Tribe under Article VIII of the Constitution are not hereby jeopardized or abrogated in any way, and provided further that *right of occupancy of reservation lands shall not include exclusive grazing privileges or rights not otherwise provided by this ordinance.*" (Emphasis added).

The foregoing part of Ordinance 22 is a clear attempt to interpret the Constitution and limit its application.

In providing for claims to be presented to the Council, Ordinance 22 provides in part as follows:

> "In giving considerationto such claims the Council shall take into account proof of ownership of the improvements by the claimant, the authority under which the claimant operated in placing such improvements and the unamortized value of the improvements in view of the length of time used together with the use value of the tribal land during the tenure by the claimant."

There is nothing in the Constitution authorizing the passing of an ordinance requiring payment for the use of the tribal land under circumstances such as we have in this case where the Petitioners were permitted to use the land for years and induced to make valuable improvements thereon without at any time being requested for payment. Therefore, that part of the ordinance is also unconstitutional.

In the testimony of Superintendent Donner it appears that when Article VIII of the Constitution was adopted it was for the very purpose of protecting long residence and improved ranges of the Petitioners and others similarly situated. (R. 121). The Department of the Interior placed the same interpretation on Article VIII. (R. 89).

We respectfully submit that the question involved is an important question of Federal law which has not, but should be, settled by this Court and that the Circuit Court of Appeals in its interpretation of the Tribal Constitution has departed from the usual rules governing the interpretation of constitutions and statutes.

As far as we have been able to learn, this is the first case in which the courts have been called upon to interpret the constitution of an Indian Tribe or to determine whether or not a Tribal Council can pass an ordinance in conflict with the Tribal Constitution.

We respectfully submit that the question is a novel one and important enough to be heard and considered by this Court.

Respectfully submitted,

FRANK E. FLYNN
328 Security Building
Phoenix, Arizona
Counsel for Petitioner